No. 78-985

In the Supreme Court of the United States

OCTOBER TERM, 1978

GREGORY-PORTLAND INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

TEXAS EDUCATION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek review of the judgment of the court of appeals directing the district court to vacate all orders previously entered and to transfer or dismiss the present action on the ground that the court should not have enjoined certain respondents from complying with an order entered by another district court in the same state. In reaching this decision, the court of appeals applied settled principles of law, and petitioners raise no issue warranting this Court's review.

1. The United States and respondent Texas Education Agency (TEA) are currently parties to a suit in the Eastern District of Texas[1] in which the district court

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[1] *United States* v. *State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (1971), aff'd and modified, 447 F. 2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

ordered TEA "to insure equal educational opportunity by refusing to fund and accredit those school districts still discriminating on the basis of race," *inter alia,* in student assignment (Pet. App. 39, 67-71). The district court's order provided (Pet. App. 70) that any school district aggrieved by action taken by TEA pursuant to the order

> shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said court may deem proper.[2]

2. On November 5, 1973, pursuant to its duties under this order, TEA notified the petitioner, Gregory-Portland Independent School District, that its student assignment policies were in violation of that order and requested that petitioner adopt either one of two plans proposed by TEA or a plan which would accomplish the same result. The letter stated that if a plan was not adopted by the end of the first week of the next school semester, TEA would, after a ten-day notice period, apply the sanctions provided in the *State of Texas* order.[3] Petitioners refused to implement any plan (Pet. App. 39), but instead, on December 14, 1973, filed the instant action against respondent TEA, *et al.*, in the United States District Court for the Southern District of Texas (*ibid.*). The petitioners sought a declaratory judgment to the effect that they had not discriminated in the operation of the school system and an order permanently enjoining the suspension of accreditation and fund termination by TEA (Pet. App. 39-40).

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[2]This language was added to the district court's order at the suggestion of the court of appeals, see *United States* v. *State of Texas, supra,* 447 F. 2d at 441-442.

[3]The sanctions, provided in subsections (4) and (5) of Section F of the August 9, 1973 order, consisted of suspension of state accreditation and state funds under the Minimum Foundation Program (Pet. App. 69).

3. TEA filed a motion to dismiss on the ground that its actions had been taken pursuant to the order of the district court for the Eastern District of Texas in *United States* v. *State of Texas, supra,* and requested the Southern District court either to dismiss the action or to transfer it to the Eastern District.

On January 24, 1974, the district court below granted petitioners' motion for a preliminary injunction (Pet. App. 1-5). A hearing was held on TEA's motion to dismiss for want of jurisdiction. Thereafter, the United States filed a brief as *amicus curiae* supporting TEA (Pet. App. 7). However, on February 28, 1974, the district court denied the motion, concluding that the instant suit came within language in the State of Texas order that

> [n]othing herein shall be deemed to affect the jurisdiction of any other district court with respect to any presently pending or future school desegregation suit.

(Pet. App. 9).[4]

Following a hearing, the district court, on January 30, 1976, granted petitioners their requested relief, permanently enjoining TEA from taking any action against petitioners to enforce any portions of the order in *United States* v. *State of Texas* (Pet. App. 14-29). After learning that TEA did not intend to appeal that judgment, and within the 30 day time period provided by Fed. R. App. P. 4(a), the United States sought leave to intervene for the purpose of appeal. On May 14, 1976, the district court denied that motion as untimely and for lack of a substantive interest in the outcome of the suit (Pet. App. 30-37).

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[4]On June 3, 1974, the United States filed a petition in the United States Court of Appeals for the Fifth Circuit for a writ of mandamus directing the Southern District court to discontinue proceedings or to transfer them to the Eastern District. On December 30, 1974, the court of appeals denied the writ (Pet. App. 11-13).

The United States appealed from the denial of the motion to intervene in order to raise the issue of the propriety of the district court's refusal to dismiss or transfer the case. On July 10, 1978, the court of appeals concluded that (Pet. App. 41)

> because the injunction against TEA interfered with the integrity of the order from the Eastern District, the Southern District Court should have declined jurisdiction.

It directed the district court to dissolve the injunction, vacate all orders, and transfer the action to the proper court or dismiss (*ibid.*). In a footnote, the court of appeals stated that it was unnecessary to address the question whether the district court erred in denying the motion of the United States to intervene, since the court lacked jurisdiction to entertain the action in which intervention was sought (*id.* at 41 n.1). However, in a special concurrence Judge Godbold reasoned that (Pet. App. 42)

> until the United States is permitted to intervene this court has no viable notice of appeal before it and no jurisdiction to examine the jurisdiction of the district court.[5]

4. Petitioners' suit essentially sought review of the order entered by the United States District Court for the Eastern District of Texas in *United States* v. *State of Texas, supra,* and a determination whether respondents TEA, *et al.*, have correctly interpreted the provisions of that order.[6] As the court of appeals below correctly held,

[5]He stated that he would hold that the district court erred in refusing to permit intervention for purposes of appeal (Pet. App. 42).

[6]The district court erred in concluding that its jurisdiction over the instant suit came within the proviso in the *State of Texas* order for

petitioners have addressed their concerns to the wrong forum (*Covell* v. *Heyman,* 111 U.S. 176, 182 (1884)):

> The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity * * *.

Although *Covell* dealt with potential conflicts between state and federal courts, the principles of comity are equally applicable to cases presenting potential conflicts between two federal courts. *Bergh* v. *State of Washington,* 535 F. 2d 505 (9th Cir.), cert. denied, 429 U.S. 921 (1976); *Spencer* v. *Kugler,* 454 F. 2d 839 (3d Cir. 1972); *Mann Manufacturing, Inc.* v. *Hortex, Inc.,* 439 F. 2d 403 (5th Cir. 1971).

The district court in its February 28, 1974 memorandum accompanying the order denying respondents' motion to dismiss or transfer stated (Pet. App. 8):

> We are concerned if the Commissioner has properly carried out Section [(F)(1)] of the order of the Tyler Court.

The question of compliance with an order of a district court properly rests with the court issuing the order and should not ordinarily be determined by another district court. The court in the *State of Texas* case has provided petitioners with an adequate remedy for resolution of questions concerning TEA's actions taken pursuant to its order (Pet. App. 70):

"any presently pending or future school desegregation suit" (Pet. App. 62). The suit brought by petitioners was an attempt to halt TEA's efforts to obtain desegregation of petitioners' schools through the methods authorized in the *State of Texas* litigation. There is no reason to believe that the Eastern District court contemplated that suits challenging its order could be brought in other district courts.

> Any school district aggrieved * * * shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said court may deem proper.

In holding that the district court under these circumstances should have declined jurisdiction, the court of appeals acted properly.[7]

5. It may well be that the concurring judge in the court of appeals was correct in suggesting that the appellate court should have considered the issue of intervention by the United States before proceeding to determine whether the district court had jurisdiction over the case (Pet. App. 42). Any error, however, is not of a nature which warrants review by this Court, since it would not affect the judgment. As the concurring opinion correctly noted (Pet. App. 42), post-judgment intervention for the purpose of appealing is proper where the initial party has declined to appeal so long as intervention is sought promptly after the entry of final judgment. *United Air Lines, Inc.* v. *McDonald,* 432 U.S. 385 (1977); *Stallworth* v. *Monsanto Co.,* 558 F. 2d 257 (5th Cir. 1977); *Smuck* v. *Hobson,* 408 F. 2d 175 (D.C. Cir. 1969); *Pellegrino* v. *Nesbit,* 203 F. 2d 463 (9th Cir. 1953).[8]

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[7]Petitioners' argument that they should not be required to travel to a more distant forum ignores the fact that if TEA's actions had been taken solely under state law, review could be had only in a state court located in the county where TEA is located, *i.e.,* Travis County, Texas. Tex. Educ. Code Ann., tit 2, §11.13(c) (1972). The provisions of the *State of Texas* order are thus consistent with centralized review under state law.

[8]Although the court of appeals did not address the issue whether the United States had the requisite interest to enable it to intervene, the fact that the order which it had obtained in the *State of Texas* suit was being collaterally attacked supplies that interest.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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